

Before the
 FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)
)
 Interactive Video and Data
 Service (IVDS) Licenses

Various Requests by
 Auction Winners

ORDER

Adopted: November 30, 1995

Released: December 6, 1995

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. Licensees in the Interactive Video and Data Service (IVDS) have filed various auction-related requests, including requests for interpretation of the Commission's Rules. These petitioners won licenses in the IVDS auction, held July 28 and 29, 1994, and were granted licenses on either January 18 or February 28, 1995. By this Order, we deny these requests.

2. The requests fall into four general groups. The first group consists of licensees requesting that the Commission transfer the bidding credit to the other winning bidder in the same service area where the original beneficiary of such bidding credit has defaulted. Another licensee similarly requests that the Commission allow it to switch frequency blocks where the other winning bidder in the same service area has defaulted. The second group involves requests to reduce the total payment amounts and revise the installment payment program. The third group concerns requests to modify the installment payment program so that payments are due in annual rather than quarterly installments. The final group consists of miscellaneous requests.

II. DISCUSSION

A. Transfers of Bidding Credits and Frequency Segments

3. In the Fourth Report and Order in the auctions proceeding, the Commission adopted a 25 percent "bidding credit" for companies owned by minorities and/or women, to help ensure their opportunity to participate in the auctions process and the provision of IVDS offerings. The credit provides a 25 percent discount on the price an eligible winning bidder ultimately must pay

for its license. The Commission limited use of this credit, however, to one license per IVDS service area; that is, a bidding credit would be available for the license on frequency segment A or B, but not on both segments. Consequently, at the July 28-29, 1994, auction, the highest bidder in each service area was permitted to take the bidding credit, if eligible, and to take first choice of the two frequency segments (A or B). With only one bidding credit available in each service area, if it happened that the two highest bidders were both eligible for the credit, the second highest bidder was immediately given the option of accepting the remaining license without the credit, or declining the remaining license.

4. Following the auction, certain winning bidders that had been awarded bidding credits defaulted on their licenses, leaving the credit unused (to date) in the affected service areas. As a result, the following petitioners (that also qualify for the credit) request that their licenses, as well as the licenses of others similarly situated, be modified to transfer the bidding credit: Combined Interactive, Inc. (Combined); Harinder Kumra (Kumra); MKS Interactive, Inc. (MKS); Pegasus IVDS, Inc. (Pegasus); and Two Way TV, Inc. (Two Way TV). Similarly, joint petitioners AG Partners, Friends of IVDS, IVDCO LLC, IVDS/RLV Partnership, Infopower International, Nanowave Technologies, New England Mobile Communications, Inc., Tele-Link Communications, WCTV Partners, Washington Communications, Wayne Partners, and Zarg Corporation (Joint Petitioners) request that the subject bidding credits be available, at re-auction, only to non-defaulting bidders from the previous auction. Finally, Self Communications, Inc. (Self), requests that its license be modified to change the frequency segment it was originally awarded.

5. Petitioners note that, unlike the defaulters, they have satisfied the requisite filing and payment obligations. They argue that the defaulters' winning bids were unrealistic, and that petitioners were therefore outbid through no fault of their own. They therefore assert that fairness dictates that they now be awarded the bidding credit. Finally, Two Way TV argues that the auction rules permit the Commission to transfer a defaulted license to the next highest bidder, and that this implies authority to transfer bidding credits as well.

6. We deny these requests. The petitioners have been awarded precisely what they bid on, and we do not believe that fairness requires that they receive additional post-auction benefits as a result of the actions of defaulting bidders. These bidders had no reasonable expectation that they would ultimately receive a bidding credit and, in fact, were afforded the opportunity to accept or decline their license after the highest bidder selected a license. We do not believe that post-auction defaults by some bidders warrant providing a windfall to the other winning bidder in a market.

7. In order to deter insincere bidding, the Commission requires that bidders make certain financial certifications and upfront payments, and has established remedies for defaults. In

addition, the Commission has, through seminars, bidder information packages and fact sheets, attempted to ensure that all bidders are provided with sufficient information to make reasonable business decisions about the value of the licenses prior to the auction. Such safeguards help ensure that bids are based on informed valuations, but they cannot guarantee that some bidders will not value the licenses differently and may bid beyond their means. Beyond the safeguards and default remedies noted above, the Commission cannot prevent bidders from making uneconomic bidding decisions.

8. Self's request raises the issue of whether a licensee may participate in the re-auction of the defaulted licenses and win the other license (A or B) in its service area. Although an IVDS license holder may not hold another IVDS license, or an interest in such license, in its service area, a licensee might wish to "switch" licenses through the auction process, if permitted. We intend to address this possibility separately, in our reconsideration of the Fourth Report and Order in the auctions proceeding.

B. Total Payment Amounts

9. Several petitioners argue that inflated bidding by bidders who ultimately defaulted forced sincere bidders to pay too much for their licenses. Accordingly, many winning bidders argue that the Commission should reduce the amount due from winning bidders to account for the inflationary effect that defaulters had on the bidding. These petitioners argue that, without such relief, the viability of IVDS as a service is threatened due to the extra financial burden placed upon IVDS license winners. Petitioners suggest a variety of methods to compensate for allegedly inflated winning bids.

10. Joint Petitioners, for example, assert that the Commission should waive the interest payment requirement during the first twelve months of the license and extend the interest plus principal payment period from five years to seven years, with the principal and interest being amortized over the final four years of the installment payment program. Joint Petitioners also request that only interest be due during the second and third years of the revised installment payment program.

11. MKS proposes that the Commission give all winning bidders who have made the requisite payments the option to either accept or decline the market(s) won. MKS and Kingdon R. Hughes (Hughes) suggest that the Commission permit a total payment discount for all winning bidders based on the average percentage difference, on a MHz-per-pop basis, between markets won by defaulters, and markets won by non-defaulting bidders; extension of the payment term; reduction in the prevailing interest rate; and/or reduction in the amount of principal due during the last three years of the license term.

12. Graceba Total Communications, Inc. (Graceba) claims that the Commission's IVDS auction procedures were primarily responsible for the alleged inflated bid prices, rather than the defaults of certain winning bidders, as other petitioners have suggested. Graceba argues that the system appears to be revenue driven and encourages unnecessary competition. Graceba claims, for example, that allowing only one bidding credit per market, created a bidding war between

eligible bidders, thereby inflating prices. Secondly, by permitting eligible bidders to decline the second license, after having been, in part, responsible for inflating the first license price. and then allowing them to bid at the re-auction of the declined block. also unnecessarily inflated the bid prices. To rectify this alleged unfairness, Graceba and Knightsbridge Business Network request a forty percent and a sixty percent reduction. respectively, in total payments for all auctioned licenses.

13. IGGW Interactive. Inc. (IGGW) and Kumra request that the Commission **adjust** payment prices in markets where defaults occurred so that the non-default payment price corresponds to the re-auction price of the defaulted license. Similarly. IVDS Enterprises Joint Venture (Enterprises) notes that the non-defaulting winning bidder should be permitted to retain its original bid. if it is lower than the re-auction winning bid.

14. Lastly. Enterprises submits that the Commission should compare the aggregate dollars bid by the defaulting bidders, *i.e.*, \$75 million, to the total dollars bid by all IVDS auction winners (defaulters and non-defaulters alike), *i.e.*, \$248 million, to obtain what it calls an “insincere bid percentage” of 30.2 percent. Provided that a non-defaulting licensee. within the first three years of its license term, invests in the construction of its system the dollar

equivalent of 30.2 percent of its winning bid, the Commission should, Enterprises argues, reduce the total purchase price of the license by that amount.

15. Section 309(j)(3) of the Communications Act outlines the following objectives of competitive bidding: (1) encouraging the rapid development of new technologies for the benefit of the public, (2) promoting economic opportunity, (3) recovering for the public a portion of the value of the spectrum, and (4) efficient and intensive use of the electromagnetic spectrum. In implementing its auction authority, the Commission sought to allow the marketplace to determine the value of auctioned licenses. Bidders must conduct their own due diligence prior to the auction and base their bids on their own license valuations. The Commission has imposed bid withdrawal and default remedies to deter insincere bidding, but the Commission cannot prevent bidders from making uneconomic bidding decisions. Moreover, we do not believe that the actions of some defaulting bidders justify modifying the payment terms of non-defaulting bidders. We therefore deny the petitions on this issue.

C. Installment Payments

16. IVDS licensees that qualify as small businesses are eligible to pay their winning bid amount(s) in installments over the five-year term of the license(s). Following the initial IVDS auction, the Commission granted licenses on January 18 and February 28, 1995. Subsequently, by Public Notice and by materials sent to the individual licensees, the Commission initiated a quarterly installment payment program. Numerous licensees have requested that the Commission modify the installment program to require annual rather than quarterly payments.

and to require that the first payment be due one year after the **date of the** license grant. Others have requested that the first payment date be delayed for a period of three to twenty-one months. We deny these requests.

17. Concerning the request for annual installments, petitioners argue, first, that the auction rules and public notices failed to give them adequate notice that payments would be required quarterly, and that the Commission failed to follow Administrative Procedure Act (APA) requirements in implementing the installment payment program. Second, they argue that the current state of the IVDS financial and equipment markets makes it difficult to raise capital or earn revenue at this time, and that the requested relief is therefore in the public

interest. Last, they contend that annual payments are easier for the Commission to administer.

18. The implementation of the IVDS installment payments program satisfied APA requirements. Following “notice and comment” procedures, the Commission adopted Section 1.2 11 O(d) of its auction rules, which states that “[u]pon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan.” The rule continues,

Such plans will:

- (i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;
- (ii) allow installment payments for the full license term;
- (iii) begin with interest-only payments for the first two years; and
- (iv) amortize principal and interest over the remaining term of the license.

Thus, auction participants had adequate notice that additional details of the installment payment program would be forthcoming after the auction was completed and the licenses granted. The repayment schedule established by the Office of Managing Director is consistent with generally accepted lending practices. Licensees were notified of the details of the installment payment program promptly after the grant of their licenses, consistent with procedures specified in the rule. We disagree that, because the above payment rule states that interest-only payments are due “for the first two years,” it was reasonable for bidders to infer that “installments” meant “annual installments.” Nor do we think that this argument is bolstered by the fact that the IVDS rules contain one-year, three-year, and five-year construction “build-out” requirements. We believe that petitioners could not reasonably have been misled on this point.

19. As noted, petitioners also argue that the IVDS financial and equipment markets make it difficult to raise capital or earn revenue, and that their requested relief of annual installment payments, or, in **the** alternative, a set-back of the first installment payment date, is therefore in the public interest. At this juncture, however, pursuant to the language of a Bureau **Order** of September 22, 1995, **the** initial installment payment will not be required until January 5, 1996, thereby already approaching the one-year anniversaries of the license grants (from January 18 and February 28, 1995). If petitioners, individually, still require financial assistance after that

time, under the rules they may request a three-month grace period at any time during the first 90 days following a missed installment payment.

20. Last, petitioners argue that annual installment payments are easier for the Commission to administer. The Office of Managing Director has implemented other quarterly payment schedules, however, including one currently underway for regional narrowband Personal Communications Service (PCS) licensees, and has found that quarterly payments strike a good balance administratively for both the Commission and licensees.

D. Miscellaneous Requests

21. American Interactive, Community Teleplay, Inc. (CTI), The Hago Company. Inc. (Hago Company), Joint Petitioners, MKS, and Gonzalo Vidal request that in any re-auction of defaulted licenses, the universe of eligible bidders be limited to two categories of entities: those that registered for the July 28-29, 1994, auction and did not win licenses, and those that won licenses at that auction and subsequently submitted the requisite down payments and license applications. We deny these requests. As we discussed in the Second Report and Order in the auctions proceeding, including new applicants in the re-auction of defaulted licenses helps ensure a competitive auction. We reiterate the importance of attracting as many qualified bidders as possible to the re-auction of defaulted markets. We retain,

however, the discretion to prohibit defaulters from participating in future auctions in instances where we find gross misconduct, misrepresentation, or bad faith.

22. Hughes, IGGW, **Kumra**, and MKS request that, in connection with any re-auction of defaulted licenses, the Commission increase the "upfront payment" amount bidders must pay to participate in the auction. Such a change would require an amendment to the IVDS auction rules, and is an issue more properly directed to the reconsideration of the Fourth Report and Order (IVDS) in the auction proceeding, the issue in that proceeding, and will consider **these petitions** in that context.

23. Graceba requests that, in light of the recent Supreme Court decision of Adarand Constructors, Inc. v. Peña, 63 U.S.L.W. 4523 (U.S. June 12, 1995), the Commission award Graceba the 25 percent bidding credit granted to minority and women-owned winning bidders at the initial IVDS auction. The Adarand case extends a strict judicial scrutiny analysis to all federal programs that make distinctions on the basis of race or ethnicity. Under a strict scrutiny standard of review, such programs must be narrowly tailored to serve a compelling governmental interest. To the extent Graceba now challenges the Commission's rule providing a 25 percent bidding credit to businesses owned by minorities or women, we find that Graceba's challenge is an untimely petition for reconsideration. Petitions for reconsideration must be filed no later than 30 days after public notice of a Commission action. See 47 U.S.C. § 405. Public notice of the

Commission's adoption of the rule in question, 47 C.F.R. §95.816(d)(1) (1994), commenced on May 13, 1994. Thus, Graceba's challenge should have been filed by June 13, 1994. Graceba's challenge was not filed until July 11, 1995. In addition, Graceba's petition does not demonstrate why it requires financial assistance under our 25 percent bidding credit rule. For example, its petition contains no evidence that it has faced discriminatory financial barriers to entry into the telecommunications industry. We therefore deny Graceba's request.

IV. CONCLUSION

24. For the reasons described above, we deny or dismiss the subject requests.

V. ORDERING CLAUSE

25. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), this ~~Order~~ **IS FURTHER ORDERED** that, as described above, the petitions filed by IGGW Interactive, Inc., **Kingdon R. Hughes**, Harinder Kumra, and MKS Interactive, Inc., ARE DISMISSED in part to the extent described above and ARE DENIED in all other respects. IT IS FURTHER ORDERED that the remaining petitions filed by the petitioners listed in the Appendix to this Order, ARE DENIED. This Order IS EFFECTIVE IMMEDIATELY.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Mobility Item - on the 8th floor

IUDS Schedule Change 1-4 Medications (2)

RTT